Supreme Court, U.S.
FILED

01 333 JUL 30 2001

OFFICE OF THE CLERK

No. 01 -

In the Supreme Court of the United States

ELIZABETH H. COOK, FRANK BOWDEN,
and JAMES COOPER,
Petitioners,

v.

JIM BACA, IN HIS CAPACITY AS Mayor of the City of Albuquerque, and THE CITY OF ALBUQUERQUE.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BRIAN J. PANGRLE
COUNSEL OF RECORD, PETITIONERS
THE PANGRLE LAW FIRM
421 W. RIVERSIDE AVENUE, SUITE 500
SPOKANE, WASHINGTON 99202
1 (509) 324 - 9256

DAVID A. STANDRIDGE, JR.
ATTORNEY, PETITIONERS
THE STANDRIDGE LAW FIRM
2425 SAN PEDRO RD. NE, SUITE 102
ALBUQUERQUE, NEW MEXICO 87110
1 (505) 880 - 8737

July 30, 2001

57 pp

QUESTION PRESENTED

Whether a government policy that compels utility ratepayers to subsidize an elected official's political speech violates the ratepayers' First Amendment rights wherein the speech is not germane to utility services and offends some ratepayers whom have no other source of utility services.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provisions involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	12
Appendix A	1a
Appendix B	5a
Appendix C	40a
Appendix D	41a

TABLE OF AUTHORITIES

Cases:

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) ..... *passim*

Alabama Libertarian Party v. City of Birmingham, Ala., 694 F.Supp. 814 (N.D. Ala. 1988) 4, 5, 10

Bd. of Regents of the Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217 (2000) 4-7, 10, 11

Cahill v. New York Public Service Comm'n, 76 N.Y.2d 102; 556 N.E.2d 133 (NY Ct. App. 1990) 12

Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y., 447 U.S. 530 (1980) 4, 11

United States et al. v. United Foods, Inc., 533 U.S. ___ (2001) ..... *passim*

Constitution and Statutes:

U.S. Const. Amend. I ..... *passim*

U.S. Const. Amend. XIV 2

28 U.S.C. 1254(1) 2

In The
SUPREME COURT OF THE UNITED STATES
No. 01-____

ELIZABETH H. COOK, FRANK BOWDEN, and JAMES COOPER,
Petitioners,
v.
JIM BACA, in his capacity as Mayor of the City of Albuquerque and CITY OF ALBUQUERQUE.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Brian J. Pangrle, on behalf of the Petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The order and judgment of the court of appeals (App. 1a-4a) is unreported. The opinion of the district court (App. 5a-39a) is reported at 95 F.Supp.2d 1215.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2001. App. 1a-4a. A petition for rehearing was denied on May 1, 2001 (App. 41a-42a). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech * * *.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *.

STATEMENT

This case concerns the constitutionality of a government policy that compels utility ratepayers to subsidize an elected official's political speech wherein the speech is not germane to the utility services and offends some ratepayers who have no other source for utility services.

This policy allowed an elected official to send, during a mail-in election, over 150,000 utility bills carrying an 11th hour message urging ratepayers to vote for his proposed road tax initiative, which was the sole issue on the election's mail-in ballot. The initiative passed by 753 votes and authorized the

government to collect over $250 million in taxes over a ten-year period. App. 6a-8a.

The court of appeals affirmed the district court's judgment for "substantially the same reasons" and held that "[w]here government funds are used for minimal advocacy of a government initiative, there is no ominous threat to the First Amendment and thus no violation." App. 4a.

This case also concerns whether the court of appeals properly denied a timely filed petition for rehearing that requested delaying reconsideration until this Court rendered a decision in *United States et al. v. United Foods, Inc.*, 533 U.S. ___ (2001). A petition for rehearing was filed on April 12, 2001, the court of appeals denied the petition for rehearing on May 1, 2001 (App. 41a) and this Court rendered its decision in *United Foods* on June 25, 2001. Petitioners assert that *United Foods* would have made a material difference to the outcome of Petitioners' case.

1. City of Albuquerque Mayor, Jim Baca ("Baca" or "Mayor"), placed an 11th hour message on the March 1999 City of Albuquerque ("City") water utility bill urging voters to vote for his proposed Quarter Cent Transportation Initiative ("Road Tax"), which was the sole issue on a mail-in election ballot. The water bill was sent during the balloting period to over 150,000 City water utility ratepayers at a cost of $53,000. The Road Tax passed by only 753 votes and authorized the City to collect over $250 million in taxes over the next ten years. App. 6a-8a.

2. On March 25, 1999, Petitioners filed suit in district court. The complaint alleged that Baca and the City misused water utility ratepayers' fees and that this misuse violated the Petitioners' First Amendment rights. Petitioners subsequently requested equal access to the water utility bill for political speech; however, the City denied access. In turn, Petitioners filed a supplemental complaint that alleged prior restraint and viewpoint discrimination.

Cross-motions for summary judgment were filed in January 2000. In an effort to have the district court apply *Abood*, Petitioners quoted Justice Blackmun's dissenting opinion in *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.* 447 U.S. 530, 552 (1980) (J. Blackmun dissenting): "If the State compelled an individual to help defray the utility's speech expenses, that compulsion surely would violate that person's First and Fourteenth Amendment rights. *Abood v. Detroit Board of Education*, 431 U.S. 209, 233-235 (1977)." However, on April 25, 2000, the district court granted judgment in favor of the City and Baca. App. 5a, 40a. In granting judgment for the City and Baca, the district court disregarded *Abood* and relied on *Alabama Libertarian Party v. City of Birmingham, Ala.*, 694 F.Supp. 814 (N.D. Ala. 1988) and dicta from *Bd. of Regents of the Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217 (2000).

In *Alabama Libertarian*, the U.S. District Court for the Northern District of Alabama considered whether the City of Birmingham violated First Amendment rights of its taxpayers by using taxpayer funds for

newspaper advertisements and leaflets stating "VOTE YES on May 12!" and "vote for the bond issue and funding on May 10!". *Alabama Libertarian*, 694 F.Supp. at 814, 817. In considering these taxpayer allegations, the Northern District of Alabama court held that this speech was not "political or ideological in nature" and consequently that *Abood* does not apply to non-political and non-ideological speech. *Id.*

In Petitioners' case, the district court determined that the Mayor's water bill message was political speech (App. 24a, n. 14); yet, it still reached the same result as *Alabama Libertarian*, i.e., no First Amendment violation. Ultimately, the district court held that "where the mayor [Baca] provided minimal advocacy of a tax initiative he created, the Court finds no First Amendment violation." App. 36a-37a. This holding disregards *Abood* and relies primarily on *Alabama Libertarian* and *Southworth* dicta.

3. A timely appeal to the court of appeals followed. Petitioners' briefs and oral argument relied heavily on *Abood* while the City and Mayor relied mainly on *Alabama Libertarian* and *Southworth*. On March 29, 2001, the court of appeals affirmed the district court's judgment for "substantially the same reasons" and held that "[w]here government funds are used for minimal advocacy of a government initiative, there is no ominous threat to the First Amendment and thus no violation." App. 4a.

4. On April 12, 2001, Petitioners filed a timely petition for rehearing with the court of appeals that requested an analysis under *Abood* and a delay until

this Court rendered a decision in *United States et al. v. United Foods, Inc.*, 533 U.S. ___ (2001). However, the court of appeals did not delay its decision and instead denied the petition for rehearing on May 1, 2001. App. 41a. This Court rendered its decision in *United Foods* on June 25, 2001.

REASONS FOR GRANTING THE PETITION

The court of appeals has held constitutional, within the meaning of the First Amendment, a government policy that compels utility ratepayers to subsidize an elected official's political speech wherein the speech is not germane to the utility services and offends some ratepayers who have no other source for utility services. Specifically, the court of appeals held that "[w]here government funds are used for minimal advocacy of a government initiative, there is no ominous threat to the First Amendment and thus no violation." App. 4a. While Petitioners contend that the subsidized advocacy was not minimal and that interfering with an election constitutes an ominous threat, Petitioners also contend that the court of appeals' decision misconstrues this Court's precedents, including *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) and *Bd. of Regents of the Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217 (2000), and conflicts with *United States et al. v. United Foods, Inc.*, 533 U.S. ___ (2001).

Petitioners assert that *United Foods* would have made a material difference in the outcome of Petitioners' case. In their petition for rehearing,

Petitioners focused on the likely impact of *United Foods* and expected a delayed decision until this Court decided *United Foods*; however, the court of appeals did not wait. Consequently, the court of appeals decision conflicts with *United Foods*.

Certiorari is warranted to review the court of appeals' decision to resolve misconstruction of *Abood* and *Southworth* and to allow for application of *United Foods*. Further, the government policy in question has a profound impact on individuals' First Amendment rights, democratic elections and election financing. At a minimum, a grant, vacate and remand is warranted.

1. Petitioners assert that under *United Foods* and *Abood*, the Mayor's and the City's compelled speech policy cannot pass First Amendment scrutiny. In *United Foods*, this Court answered the question of "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." *United Foods*, 533 U.S. at ____ (slip op. at 3). In answering this question, this Court stated "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . . [a]s a consequence, the compelled funding for the advertising must pass First Amendment scrutiny". *United Foods*, 533 U.S. at ____ (slip op. at 4-5).

In Petitioners' case the Mayor's and the City's policy allows the Mayor to speak with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced. In particular, this policy allowed the Mayor to express his viewpoint in a water billing statement during an election. The Mayor's viewpoint was expressed as a plea to vote for his proposed Road Tax: "75% of Albuquerque's roads are deteriorating. Don't forget to mail in your ballot to the City Clerk by March 31, 1999 for the Quarter Cent Transportation Initiative." App. 6a. The class of persons compelled to subsidize the Mayor's speech comprised City of Albuquerque water utility ratepayers who have no alternative source from which to purchase water and water utility services. Further, Petitioners, as water utility ratepayers and members of Concerned Citizens of Albuquerque, disagreed adamantly with the idea advanced by the Mayor. In addition, the City denied Petitioners' request for placement of political speech in the same forum using the same resources. App. 7a-8a.

On the basis of these facts and *Abood* and *United Foods*, Petitioners assert that the Mayor's and the City's compelled speech policy is unconstitutional.

2. Petitioners further assert that the Mayor's speech was not germane to the purpose of the forum or to the purpose of the compelled subsidy. In *United Foods*, this Court elaborated the germaneness prong of the test in *Abood* by stating that "the expression respondent is required to support is not germane to a

purpose related to an association independent from the speech itself; and the rationale of *Abood* extends to the party who objects to the compelled support for this speech." *United Foods*, 533 U.S. at ___ (slip op. at 9). Thus, the speech in question must be germane to a purpose related to the association and independent from the speech itself.

In Petitioners' case, the Mayor's speech was related to how voters should vote concerning his proposed Road Tax. Thus, the Mayor's political speech was unrelated to the purpose of the water billing statement and further unrelated to ratepayers' fees for water and water utility services. Ratepayers do not associate to support the Mayor's personal political viewpoint on issues unrelated to water and water utility services.

Thus, *Abood*'s germaneness prong, as elaborated in *United Foods*, does not provide a safe-haven for the City and the Mayor. Consequently, the Mayor's and the City's policy should be held unconstitutional.

3. Petitioners further assert that the City and the Mayor do not have a safe-haven under a government speech theory. In *United Foods*, this Court did not entertain the United States' argument regarding "government speech". *United Foods*, 553 U.S. at ___ (slip op. at 10). However, in Petitioners' case, some semblance of a government speech theory was raised by the Mayor and the City at the district court and at the court of appeals. Unfortunately, the court of appeals did not significantly add to the district court's opinion. The court of appeals simply stated

that "[w]here government funds are used for minimal advocacy of a government initiative, there is no ominous threat to the First Amendment and thus no violation." App. 4a.

To support a government speech theory, the district court relied on *Alabama Libertarian* and *Southworth* dicta. Petitioners assert that *Alabama Libertarian* is flawed and that the dicta of *Southworth* does not apply to the policy in question.

Alabama Libertarian is flawed because the District Court for the Northern District of Alabama failed to characterize the City of Birmingham's speech as political or ideological speech. Clearly speech advocating a "yes" vote on a ballot issue constitutes political speech. Therefore, *Alabama Libertarian* is seriously flawed and more so since this Court decided *United Foods*, wherein even commercial speech is entitled to First Amendment protections and analysis under *Abood*.

In Petitioners' case, the district court quoted the following *Southworth* dicta: "it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." App. 37a. While admitting that this was dicta, the district court nevertheless stated that "the Supreme Court's understanding of the issue strengthens this court's conclusion that Defendants' publication of the water bill's message box with a message advocating a pro-position on a tax initiative to advance city programs, which the mayor himself had proposed, did not constitute an unconstitutional

use of public funds." App. 37a. The court of appeals affirmed "for substantially the same reasons given by the district court" (App. 4a.), which indicates that it assented to the district court's interpretation.

In light of *United Foods*, Petitioners assert that the district court's interpretation of the *Southworth* dicta does not coincide with the understanding of this Court and consequently, that the court of appeals decision does not coincide with the understanding of this Court either. Ultimately, the First Amendment cannot withstand a policy that allows for a Mayor's exclusive use of ratepayer funds (or even taxpayer funds) to tell the electorate how to vote; however, the district court's and the court of appeals' application of *Southworth* dicta lead to a contrary result. The district court's and the court of appeals' reliance on *Alabama Libertarian* and *Southworth* warrants review.

4. A proper application of *Abood* and *United Foods* to the facts of Petitioners' case would produce a result that is inline with the rationale of Justice Blackmun's dissenting opinion in *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.* 447 U.S. 530, 552 (1980) (J. Blackmun dissenting): "If the State compelled an individual to help defray the utility's speech expenses, that compulsion surely would violate that person's First and Fourteenth Amendment rights. *Abood v. Detroit Board of Education*, 431 U.S. 209, 233-235 (1977)." Judge Bellacosa of the New York Court of Appeals expressed a similar sentiment: "Here, ratepayers are powerless against governmentally regulated monopolies and have no place else to seek

indispensable public utility services. By that unique circumstance, they are more seriously burdened and disadvantaged than the contributing nonunion members in *Abood*." *Cahill v. New York Public Service Comm'n*, 76 N.Y.2d 102, 112; 556 N.E.2d 133,136 (NY Ct. App. 1990).

CONCLUSION

This Court's decision in *United Foods* would have made a material difference in the outcome of Petitioners' case. In particular, *United Foods* set forth the proper application of *Abood*. Petitioners' briefs and oral argument before the court of appeals relied heavily on *Abood*. Had the court of appeals considered *Abood* under the guidance of *United Foods*, Petitioners sincerely believe that the outcome would have been completely different.

Consequently, this petition for a writ of certiorari should be granted.

Respectfully submitted.

Brian J. Pangrle
Attorney of Record
Petitioners
The Pangrle Law Firm
421 W. Riverside Ave.
Suite 500
Spokane, WA 99202
1 (509) 324 - 9256

David A. Standridge, Jr.
Attorney
Petitioners
The Standridge Law Firm
2425 San Pedro Rd. NE
Suite 102
Albuquerque, NM 87110
1 (505) 888 - 8737

JULY 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ELIZABETH H. COOK, FRANK BOWDEN, and JAMES COOPER,
Plaintiffs - Appellants,
v.
JIM BACA, in his capacity as Mayor of the City of Albuquerque and CITY OF ALBUQUERQUE,
Defendants - Appellees.

No. 00-2180

(D. Ct. No. CIV-99-322-BB)
(D. N. Mex.)

ORDER AND JUDGMENT*
Entered March 29, 2001

Before TACHA, Chief Judge, LUCERO, Circuit Judge, and BROWN,[1] District Judge.

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, sitting by designation.

Appellants appeal the district court's grant of summary judgment against them on their First Amendment claims. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

The appellants are members of a government watchdog group called Concerned Citizens of Albuquerque. The appellants opposed a transportation tax proposal which came before the citizens of Albuquerque for approval on March 31, 1999. Appellee Jim Baca, the mayor of Albuquerque, was a supporter of the proposed tax.

Albuquerque provides its citizens with water service and mails a monthly billing statement to those who utilize the city's water service. Every water bill provides a space for the mayor of Albuquerque to address a short informational message to the city's citizens. On the March, 1999 water bill, Mayor Baca used the space to advocate the passage of the transportation tax.

On March 25, 1999, the appellants filed suit in federal district court alleging that Mayor Baca and the city of Albuquerque had violated their rights under the First Amendment of the Constitution. On July 27, 1999, the appellants requested access to the water bill in order to distribute a political message of their own. The city denied the appellants access to the bill. Subsequently, the appellants filed a supplemental

complaint alleging further violations of their First Amendment rights. Cross motions for summary judgment were filed and, on April 25, 2000, the district court granted the appellees' motion and dismissed the case. This appeal followed.

II.

We review a district court's grant of summary judgment de novo applying the same legal standard applicable in the district court. St. Charles Inv. Co. v. C.I.R., 232 F.3d 773, 775 (10th Cir. 2000).

The appellants argue that the mayor's message on the water bill and the city's refusal to place the appellants' own message on the bill amounted to: (1) an unconstitutional denial of free speech; (2) unconstitutional viewpoint discrimination; (3) unconstitutional prior restraint; and (4) an unconstitutional use of public funds. The district court held that the water bill was a non-public forum, and thus the government's speech restraint was subject only to a reasonableness analysis. The court further found that restricting the water bill message exclusively to the mayor of the city was reasonable. Ancillary to this, the court found that the restriction was not based on viewpoint discrimination, but rather on a policy restricting access to the particular non-public forum to the mayor alone. The court went on to rule that even if the restriction operated as a prior restraint, the prior restraint was constitutional because the forum was non-public and the restraint

was reasonable. Finally, the district court found that government funds are inevitably used to promote government objectives that are contrary to certain taxpayers' beliefs and convictions. Where government funds are used for minimal advocacy of a government initiative, there is no ominous threat to the First Amendment and thus no violation.

For substantially the same reasons given by the district court, we agree that the appellants' First Amendment rights were not violated by the actions of the appellees. Accordingly, the district court's grant of appellees' motion for summary judgment is AFFIRMED.

ENTERED PER CURIAM

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELIZABETH H. COOK, FRANK BOWDEN,
and JAMES COOPER,
Plaintiffs,

v. No. CIV 99-00322
BB/WWD

JIM BACA, IN HIS CAPACITY AS Mayor of the
City of Albuquerque, and THE CITY OF
ALBUQUERQUE,
Defendants

OPINION
Entered April 25, 2000

THIS MATTER is before the Court on Plaintiffs' Motion for Summary Judgment (Doc. 28) and Defendants' Motion for Summary Judgment (Doc. 34), both filed January 21, 2000. The Court has reviewed the motions, the memoranda submitted by the parties, the relevant authorities. The Court finds that Defendants' argument is well taken and rejects Plaintiffs' argument. The Court, therefore, GRANTS Defendants' Motion for Summary Judgment, and DENIES Plaintiffs' Motion for Summary Judgment.

I. BACKGROUND

A. Facts and Procedural History

Each month the City of Albuquerque sends out a water bill to the city water users. The water bill consists of five elements: (1) the bill's base charge; (2) the customer's monthly water consumption; (3) one or two water conservation tips; (4) a bar graph comparing the billed month with the corresponding month in the previous year, the previous month, and the city's residential average; and (5) "[a]n information bulletin from the Mayor's office.[1] In the box reserved for the Mayor, each month the Mayor provides a short message to all the city's water users.[2]

On the city water bill in March 1999, the message from the Mayor consisted of the message:

> 75% of Albuquerque's streets are deteriorating. Don't forget to mail in your ballot to the City Clerk by March 31, 1999 for the Quarter Cent Transportation Initiative.
>
> - Mayor Jim Baca

The Quarter Cent Initiative proposed a quarter cent sales tax that would enable the city to raise more than

---

[1] This is the exact language as taken from the City of Albuquerque's Water Conservation Office web page on "How to Read Your Water Bill." See Doc. 29, exh. B; Doc. 35, exh. B.

[2] Examples of past statements include: "If you have a lost pet, please call the city's West Side Animal Services Facility where we house the most picked-up pets, and all our cats. For more information, please call 768-1975. - Mayor Jim Baca;" and "I encourage you to check out GOV14 on cable channel 14 for news and information on what's happening in your local government. - Mayor Jim Baca."

250 million dollars over ten years to fix roads, improve bus service, and expand recreational trails. City voters passed the Transportation Initiative.

Several days before on the vote initiative, Plaintiffs filed suit against Defendants alleging Defendants' actions violated their rights. Specifically, Plaintiffs alleged that Defendants' use of the water bill and the timing of its use denied: (1) Plaintiffs their right to a republican form of government in violation of Article IV of the Constitution; (2) Plaintiffs access to a public forum for expression of their viewpoints in violation of the First Amendment; (3) Plaintiffs equal access to a public forum in violation of the Fourteenth Amendment; (4) Plaintiffs rights and privileges secured by the Constitution in violation of 42 U.S.C. Sec. 1983.

In late July 1999, plaintiff James Cooper, on behalf of "Concerned Citizens," sent a letter to the city attorney requesting the placement of a message on behalf of Concerned Citizens in the September water bill. The letter, stated the group's understanding that the message box in the water bill was a public forum, and requested the message:

> Concerned Citizens urges you to vote against the City CharterAmendments that will appear on the October ballot. For Information call: 242-6223.

The city attorney responded to Mr. Cooper with a letter denying his request and explained that the City "does not allow political positions to be

included in the water bill." Doc. 29, exh. M.

On October 1, 1999 both parties stipulated to an Order (Doc. 18) allowing Plaintiffs to file a Supplemental Complaint, and attached the supplemental complaint to the order. Plaintiffs' supplemental complaint set forth essentially the same factual allegations as in the original complaint, and then added new facts regarding Plaintiffs' letter to the city and the city's rejection of their request, as well as three additional claims against the city.[3] Mirroring claims in the original complaint. Plaintiff claimed: (1) the city denied Plaintiffs access to a public forum in violation of the First Amendment; (2) the city denied Plaintiffs equal access to a public forum in violation of the Fourteenth Amendment; and (3) the city's denial of access to the water bill violated Plaintiffs' rights under 42 U.S.C. Sec. 1983.

On October 12, 1999 Plaintiffs re-filed their original complaint (Doc. 19), and then on October 29 re-filed their supplemental complaint under the heading "Amended Supplemental Complaint . . ." (Doc. 22). On January 21, 2000 both parties filed Motions for Summary Judgment. Plaintiffs argue summary judgment is appropriate on Claims II-VII[4]

---

[3] The Supplemental Complaint only raised claims against the city and did not address the mayor.

[4] Plaintiffs appear to have waived Claim I, which alleged a violation of Article IV, Section 4 of the Constitution. They make no mention of the Article IV claim in their Motion for Summary Judgment and it is similarly absent from the final Pre-Trial Order (Doc. 39). A "definitive pre-trial order reflecting the

because Defendants: unconstitutionally denied access to a public forum, unconstitutionally used viewpoint discrimination, unconstitutionally used prior restraint, and unconstitutionally expended taxpayer resources. Defendants, on the other hand, contend summary judgment is appropriate because Plaintiffs have waived Claims II-IV, and since the message box is not a public forum and the March 1999 water bill message from the mayor was not an unconstitutional use of resources, the remaining claims should be dismissed.

B. Summary Judgment Standard

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *See, Akin v. Ashland Chemical Co.*. 156 F.3d 1030, 1033 (10th Cir. 1998) (*citing Celotex v. Catrett*. 477 U.S. 317, 322-23 (1986)). The movant bears the burden of establishing the absence of a material question of fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). The movant may meet this burden by showing that there is an absence of evidence to support the non-moving party's case. *Celotex Corp.*, 447 U.S. at 324.

---

agreement of the parties, having been entered into after full discovery, must, of course, control the subsequent course of the action. F.R.Civ.P. 16(6)." *Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 817 (10th Cir. 1979) (citing *Case v. Abrams*, 352 F.2d 193, 195 (10th Cir. 1965)).

Once the movant meets his burden, the burden then shifts to the non-movant to demonstrate a genuine issue for trial on a material matter. *Bacchus Industries, Inc. v. Arvin Industries. Inc.*, 939 F.2d 887, 890-891 (10th Cir. 1991). The non-movant party may not rest on its pleadings, but must set forth specific facts showing there is a genuine issue for trial as to those matters for which it carries the burden of proof. *Celotex Corp.*, 447 U.S. at 324.

Thus, the relevant inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242. 251-52 (1986) The facts must be construed in favor of the non-movant and the court must consider inferences that can be drawn from those facts tending to show triable issues. *Applied Genetics Int'l. Inc. v. First Affiliated Securities. Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The Court considers both motions in light of the above standards.

II. DISCUSSION

Essentially the dispute between the parties boils down to two issues: (1) whether the water bills' message box is a designated public forum; and (2) whether the city's decision to allow the mayor to submit a message advocating a position on a City Tax Initiative was an unconstitutional use of public funds. Current law dictates both questions be answered in the negative. Before addressing these issues, however, the Court must set the parameters

of the claims under consideration.

A. Scope of the Claims

1. Supplemental vs. Amended

After Plaintiffs filed their original complaint in March 1999, the parties agreed that Plaintiffs would file a supplemental complaint. Plaintiffs subsequently submitted the supplemental complaint in an attachment to a Stipulated Order from the Court allowing the addition (Doc. 18).

Plaintiffs then re-filed the supplemental complaint on October 29, 1999 under the self-titled heading "Amended Supplemental Complaint." Defendants argue Plaintiffs waived claims II-IV from the original complaint because Plaintiffs' "Amended Supplemental Complaint" was an *amended* complaint rather than a *supplemental* complaint. Plaintiffs, on the other hand, argue that even though they titled the second supplemental complaint "Amended Supplemental Complaint," it was in fact a supplemental rather than an amended complaint.

If the complaint filed on October 29, 1999 was an amended complaint, as Defendants contend, then it superseded the original complaint. *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235, 1237-38 (5th Cir. 1978) ("[a]s a general rule an amended complaint supersedes and replaces the original complaint."). Accordingly, since the original complaint no longer performs any function, all the claims Plaintiff alleged in the original complaint that Plaintiff did not re-allege in the amended complaint would be waived. 6

Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1476(R15) (2d ed. 1990); *King v. Atiyeh*, 814 F.2d *565, 567* (9th Cir. 1987).

Clearly the first supplemental complaint – the complaint attached to the Stipulated Order – was a supplemental complaint. Doc. 18. Although it is not clear why Plaintiffs re-filed the supplemental complaint and why they chose to re-file it under a new heading,[5] the only difference between the supplemental complaint attached to the Stipulated Order (Doc. 18) and the "Amended" supplemental complaint (Doc. 22) is the word "Amended" in the title. As there was no other change to the complaint itself and no evidence to suggest Plaintiffs intended to amend their supplemental complaint, the Court determines the "Amended" supplemental complaint is in fact and legal effect a supplemental complaint.6

B. **Water Bill's Message Box**

Plaintiffs contend the water bill message box is a designated public forum and they argue defendants committed constitutional violations by refusing to print Plaintiffs' proposed message in the water bill

---

[5] The Court similarly has no explanation for why Plaintiffs re-filed the original complaint on October 12, 1999.

[6] Although the supplemental complaint adds significant new facts, new claims IV-VII are duplicative of original claims II-IV, except that the new claims are only raised against the city and not the mayor. The Court finds, therefore, that claims IV-VII are subsumed by claims II-IV.

message box. Specifically, Plaintiffs contend Defendants: unconstitutionally denied them access to a public forum, unconstitutionally used prior restraint, and unconstitutionally used viewpoint discrimination. Defendants defend their decision not to place Plaintiffs' proposed message in the water bill by arguing the message box is not a public forum.

1. Constitutional Protection of Speech

In *Cornelius v. NAACP Legal Defense & Educational Fund Inc.*, 473 U.S. 788, 798 (1985), the Supreme Court delineated a three-step process for examining the constitutional protections afforded to private speech on government property. *See also Summum v. Callaghan*, 130 F.3d 906, 913 (10th Cir. 1997). Under this framework, the Court must determine first whether Plaintiffs' proposed message is protected speech. *Cornelius*, 473 U.S. at 798. In the second step, the Court must analyze the nature of the forum. *Id.* Finally, the Court must assess whether the city's justifications for excluding Plaintiffs' proposed message from the water bill message box satisfies the standard as determined in the second stage of the analysis. *Id.*

a. Protected Speech

The first step is easily met — Plaintiffs' proposed political message is protected speech. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 597, (1998) (political speech "is the primary concern of the First Amendment"); *see also Meyer v. Grant*, 486 U.S. 414, 422 (1988).

b. *Nature of the Forum*

The second step – the nature of the forum – is critical because it establishes the Court's standard of review: "the extent to which the [city] may limit access to this property – i.e., whether a heightened or reasonableness standard applies--depends on its categorization." *Summum*, 130 F.3d. at 913. In *Perry Education Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983), the Supreme Court delineated the three different types of fora: (1) the public forum; (2) the designated public forum; and (3) the non-public forum. 460 U.S. at 45-46.

Public fora – such as streets and parks – are places whose "principal purpose [is] the exchange of ideas" and which have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Int'l Society for Krishna Consciousness. Inc. v. Lee*, 505 U.S. 672, 679 (1992) (citations and internal quotations omitted). If the water bill message box is a public forum then the government only may enforce: (1) content-based exclusions if it shows that its regulations are necessary to serve a compelling state interest and that the restrictions are narrowly drawn to achieve that end; and (2) time, place, and manner restrictions which are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. 460 U.S. at 45.

Designated public for a are a category of places

which, although not traditionally open to the public, the government has designated as such – opening the property to the public as a place of communication "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 803. Regulations in a designated public forum are examined under the same standard as in a public forum. *Perry*, 460 U.S. at 47.

Although the government may designate certain property as a public forum, "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property... ," and not every instrumentality for communication "is a traditional public forum or a public forum by designation." *Cornelius* 473 U.S. at 800, 804 (citations omitted). Some fora, then, are nonpublic. Non-public fora are examined under a different standard – the government may restrict speech in the forum so long as the regulation is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46.

Plaintiffs do not contend the water bill's message box is a public forum outright, so the only real forum question before the Court is whether the water bill's message box is a designated public forum or a non-public forum.[7] The Court finds no

---

[7] Plamtiffs', drawing on opinions from the Second Circuit, use the term "limited public forum" rather than 'designated public

forum' in their Motion for Summary Judgment, but they use this term to denote a designated public forum. Doc. 29 at 7 ("[t]herefore, when Plaintiffs apply East Timor,. . . 'limited public forum' is synonymous with 'designated public forum' .. ."). The Court observes that there is considerable confusion regarding forum category terminology and the lower courts' interpretation of the Supreme Court's use of the term 'limited public forum.' Some courts adopt this term to refer to a sub-category of designated public forums, and thus subject it to the stricter scrutiny of review. See *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, 692 (2nd Cir. 1991) ("we have identified a sub-category of the designated forum that we have styled the 'limited public forum.'") Other courts use 'limited public forum' as a sub-category of non-public forum, and consider it under a reasonableness standard. See Summum, at 130 F.3d at 915. The Tenth Circuit has noted the difficulty with some of the forum distinctions drawn: "[w]e recognize that the boundary between a designated public forum for a limited purpose [subject to strict scrutiny] and a limited public forum [subject to reasonableness test] is far from clear. Because we conclude that Summum [who employed the term 'limited public forum'] is not alleging that a designated public forum has been created, we do not have to clarify the precise distinctions between the two. We simply note that a designated public forum for a limited purpose and a limited public forum are not interchangeable terms." *Summum*, 130 F.3d at 916.

In this case Plaintiff is alleging a designated public forum was created. This does not complicate the discussion however, and the Court finds no reason to undertake the analysis to clarify the distinction between a designated public forum for a limited purpose and a limited public forum. Even though Plaintiffs invoke the term 'limited public forum,' they are, by their own admission, only arguing that the message box is a designated public forum, not a designated public forum for a limited purpose. Furthermore, as the Court concludes the water bill's message box is clearly a non-public forum, these potentially fine distinctions between various types of fora are

independent reason to consider the city water bill's message box a designated public forum. In *Summum* the Tenth Circuit discussed the factors used to determine whether the government created a designated public forum: "(1) the purpose of the forum; (2) the extent of use of the forum; and (3) the government's intent in creating a designated public forum."[8] 130 F.3d at 915. Plaintiffs have difficulties with each of these elements.

With respect to the purpose factor, the Court finds Plaintiffs' desired depiction of the water bill's message box, as forum open to any political message from anyone, to be incompatible with both the function and character of the city's water bill. The city's water bill is essentially a tool to inform ratepayers of the amount they owe the city for water use and it is not a suitable forum for the dissemination of a free range of political opinions, on

---

irrelevant to this case.

[8] The *Summum* court explained the purpose element involves a consideration of "characteristic nature and function of the particular forum involved." 130 F.3d at 915 n.13 (citation and internal quotations omitted). The extent of use requires that the government must allow "general access to or indiscriminate use of the forum in question whether by the general public, certain speakers, or for certain subjects." hi (citations and internal quotations omitted). Lastly, in ascertaining whether the government *intentionally* opened a non-traditional forum the court should look to whether "the principal function of the property would be disrupted by expressive activity or [whether] government policy or practice reveals criteria to selectively limit access." *Id.* (citation and internal quotations omitted).

the various policy issues before the city. The fact that the city permitted the mayor to include a monthly message in the water bill does not alter the primary function of the water bill: "[t]he fact that 'a government facility is specifically used for the communication of information and ideas' does not mean that it is 'ipso facto a public forum."' *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 377 (5th Cir. 1989) (quoting *Muir v. Alabama Educational Television Com'n*, 688 F.2d 1033, 104 1-42 (Former 5th Cir. 1982) (en banc)). Furthermore, unless otherwise intended, the city water bill is not an appropriate medium for the dissemination of a wide range of controversial political views. *See, Loving v. Boren*, 956 F.Supp. 953 (W.D. Okla.) *aff'd on other grounds* 133 F.3d 771 (10th Cir. 1998).

Second, and perhaps most damaging to Plaintiffs' allegation that Defendants created a designated public forum, there is no evidence to support the extent of use factor. The Supreme Court has found the extent of use requirement is not met when there is only selective access. *Cornelius*, 473 U.S. at 805; *U.S. v. Kokinda*, 497 U.S. 720, 730 (1990) (plurality opinion). Even if this Court characterized the city's permitted access to the water bill as selective, which it does not, the access would not meet the extent of use requirement. *See, Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (city had always permitted commercial, but never political, advertising on buses). In this case, however, access to the message box is less than selective, it is essentially

prohibitive – besides the mayor, the city permits access to *no one*. Both the city's policy and practice demonstrate the water bill's message box is reserved exclusively for the mayor.[9]

In Plaintiffs' Response to Defendants' Motion for Summary Judgment (Doc. 36 at 2), Plaintiffs point out that some of the past message box statements have "unidentified authors" in an endeavor to suggest the city permitted other people to submit messages to the water bill's message box in the past.[10] The Court is not persuaded. Since the city's stated policy reserves the message box for a monthly communication from the mayor, and there is no indication that anyone outside the mayor's office has

---

[9] In terms of policy, the city's web page which delineates the components of the water bill explains that the message box contains "[a]n information bulletin from the Mayor's office;" and in Defendants' Answer to Plaintiffs' First Set of Interrogatories, Defendants explained "[t]he message appearing on the water bill is an information bulletin from the Mayor's office; the space has traditionally been reserved by the Public Works Department for the Mayor of Albuquerque." Doc. 35, Exh. A at 2. Additionally there is no evidence of past practice which contradicts this policy.

[10] Plaintiffs refer to exhibit B of Defendants' Motion for Summary Judgment (Doc. 35). With one exception – when Mayor Martin Chavez left office – the message boxes before Mayor Jim Baca did not include the Mayor's name. For example, the following messages did not have the mayor's name beneath them: "Join the Albuquerque Clean Team and help keep Albuquerque Beautiful! Call 857-8280 for details;" and "Tell us your 'Good For You, Albuquerque' stories. Call the Mayor's office at 768-3000."

ever been given access to the message box, the fact that the messages before November 1997 do not have the mayor's name beneath them does not establish they came from someone other than the mayor. Furthermore, on the city's web page "How to Read Your Water Bill," where the city explains the different sections of the water bill, the sample water bill's message box contains a message with no mayor's name beneath it. Doc. 34, exh. B at 1. The Court finds no evidence the city ever allowed private individuals or groups access to the water bill's message box.

With respect to the final factor involved in this analysis – intent – not only are Plaintiffs unable to demonstrate Defendants ever intended to create a designated public forum, the city's consistent policy and practice which prohibit all messages from anyone other than the mayor clearly manifest Defendants' intent to avoid turning the water bill's message box into a designated public forum. *See, Brown v. Palmer*, 915 F.2d 1435 (10th Cir. 1990) (Military did not evidence intent to turn Air Force Base into a public forum by holding Armed Forces Day open house).

After analyzing each of the factors set forth by the Tenth Circuit in *Summum*, the Court must conclude Defendants did not create a designated public forum, and, therefore, the city water bill's message box is a non-public forum.

Nor does the Court find merit in Plaintiffs' other arguments for a designated public forum. Plaintiffs first contend the water bill's message box is a designated public forum because it is viewed by a

large number of people. Plaintiffs argue "the nature of the forum is clear: the message window enters the homes of 475,000 City residents every month — greater circulation than any Albuquerque newspaper. Its nature is that of a public forum." Doc. 28 at 8. Even if these facts are true, they are almost entirely irrelevant. While the number of persons exposed to a forum may have some marginal relevance, it is the purpose of a forum that is significant. *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999). As noted in this case, the purpose of the water bill's message box was to carry a message from the mayor.

Plaintiffs' next argument, which constitutes the bulk of their Motion, is their claim that the facts in this case are similar to the facts in *East Timor Action Network Inc. v. City of New York*, 71 F. Supp.2d 334 (S.D.N.Y. 1999) and, since the court found a designated public forum in *East Timor*, this Court should find a designated public forum in the case at bar. Contrary to Plaintiffs' assertion, however, the facts in *East Timor* do not support Plaintiffs argument.

In *East Timor*, the court examined New York City's temporary street sign system. The city, under the Department of Transportation ("DOT"), permitted the temporary renaming of streets for several specified reasons.11 71 F. Supp.2d at 338. In

---

11 Specifically, the DOT permitted the temporary renaming of a street if the name promoted or commemorated one or more of the following: a public event of a not-for-profit nature; a cultural

the past, mayors of the city had temporarily renamed street signs – for example Mayor Koch erected a sign, reading "Nelson and Winnie Mandela Corner," on a corner near the South African Government's offices; and Mayor Giuliani placed a sign near the Cuban mission naming the street "Esquino Hermanos Al Rescate/Brothers to the Rescue Corner."[12] *Id.* at 339-40. While mayors sometimes erected temporary signs, private citizens and organizations unrelated to the city were also allowed to apply for temporary signs. The city has authorized many signs over the years, such as: "Beauty Way, and Beast Aye;" "Rabbi Meyer Blitzky Way;" "Rev. Calvin Rice Way;" "The Gay Way;" "Yo Yo Ma Way;" "People Magazine Way;" and "Barbie Street." *Id.* at 338-39.

The plaintiff, a non-profit organization, brought suit against the city of New York because the DOT refused to grant an application to temporarily erect the following street signs near the Indonesian Consulate: "1991 Santa Cruz Massacre," and "Free East Timor." *Id.* at 336-37. The DOT explained that it had to deny the request because of the "sensitive political nature" of the message. *Id.* at 337. The court

---

event; an event or person of historic significance; an individual who has made a significant contribution to New Yorkers; a community or public service. A street renaming to promote products, commercial entities, political parties and/or candidates is prohibited. *East Timor*, 71 F. Supp.2d at 388-89.

[12] Brothers to the Rescue is a Miami-based Cuban exile group dedicated to the overthrow of Fidel Castro. *East Timor*, 71 F. Supp.2d at 340.

examined the different types of forum and concluded:

> the fact that the purpose for creating the forum appears to have been precisely to permit expressive activities . . . and the relatively broad access afforded members of the public (anyone, so long as the proposed sign does not fall within one of the excluded categories), support a finding that the DOT's policy has created a limited public forum.

Id. at 344. In other words, the court concluded the street sign policy was a designated public forum because the primary purpose of the policy was "precisely to permit a wide range of commemorative street signs to be erected as an expressive activity." *Id.* at 347.

These facts differ so greatly with the facts in the case at bar that it is difficult to understand Plaintiffs' desired comparison. Unlike New York City's street sign policy, the purpose of the city water bill's message box is not to permit a wide expanse of expressive activities — the purpose of the water bill's message box is to permit the mayor to provide the city with a monthly message.

In addition, unlike New York City's street sign policy, which in theory was open to anyone who met the guidelines for sign proposals and in practice approved many sign proposals from private individuals and private groups, the water bill's message box is not and has never been open to anyone other than the mayor of Albuquerque. Both

the city's policy and practice bear this out.[13] Plaintiffs cannot provide any evidence the city has ever permitted any individual or group to place a message in the water bill's message box. The court in *East Timor* had many reasons to support its conclusion that New York City's street sign policy was a designated public forum. In this case, with entirely different facts, none of these reasons are present.

Plaintiffs' final argument that Defendants created a designated public forum is based on the idea that the mayor's 'political' message in March of 1999 opened the water bill's message box as a designated public forum for politically sensitive speech.[14] Doc. 28 at 10. Plaintiffs argue, citing to

---

[13] In this respect, Plaintiffs' argument, which persistently urges the Court to consider the city's actual practice rather than its stated policy, supports Defendants' claim better than Defendants' own arguments. As discussed above, there is no evidence the city has ever allowed a private individual or group to print a message in the water bill's message box. Therefore, an examination of the city's practice strongly supports Defendants' contention that the water bill's message box is reserved exclusively for the mayor.

[14] Again, the message stated:

> 75% of Albuquerque's streets are deteriorating. Don't forget to mail in your ballot to the City Clerk by March 31, 1999 for the Quarter Cent Transportation Initiative.

Defendants spend a disproportionate amount of time in their memoranda arguing that the mayor's statement was neutral and did not advocate a position. The Court rejects this argument. The message's factual assertion coupled with the use of "for," rather than "on," sufficiently demonstrate the mayor's advocacy of his

several cases, that once the government has opened a forum for expressive activity it must "respect the lawful boundaries it has itself set." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Unfortunately for Plaintiffs, their argument fails to show the city created a designated public forum. Plaintiffs' reasoning might help them establish the contours of the water bill's message box *if* it were a designated public forum, but it does not establish that the water bill's message box *is* a designated public forum. In other words, if originally the city had opened up the water bill's message box as a designated public forum for certain types of speech (e.g. public information messages) and subsequently allowed the mayor to submit his political message, then, arguably, the city would have expanded the type of expressive activities allowed.

Here, however, the city never opened the water bill's message box to any segment of the public for any reason — it never created a designated public forum in the first place. Since the city never designated the water bill's message box as a public forum, the political message from the mayor may have altered the overall scope of the message box, but this change, at most, affected the boundary of messages the *mayor* could submit. There is no reason why the mayor's non-neutral March 1999 message would open access, of an otherwise non-public

---

position.

forum, to private individuals or groups.

For all of these reasons the Court finds the city water bill's message box is a non-public forum, not a designated public forum.

c. *Application of Standard*

The city may limit access to a nonpublic forum based on speaker identity so long as the restriction is "reasonable," with reasonableness "assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 806, 809. In this case, the primary purpose of the water bill is to inform rate payers of the amount of money they owe for water use, and the purpose of the message box is to allow the mayor of Albuquerque to transmit a monthly message. Since the water bill is sent by the city to city water users, the Court finds nothing unreasonable about the city's decision to permit the mayor of Albuquerque – the chief executive of the city – to transmit a monthly message. Additionally, given these features of the water bill, the Court finds nothing unreasonable about the city's message box policy that limits access to city water bill's message box to the mayor alone. In fact, the restrictive access of the message box is entirely consistent with the purpose of the message box.

Plaintiffs' alternative to the city policy – which would allow any private citizen or private group to submit a message regarding any subject – would create a significantly more contentious water bill message box and would likely generate

considerable controversy. As the Supreme Court has noted, "[a]lthough the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Cornelius* 473 U.S. at 811.

Finally, the Court notes that just as in the *Perry* and *Cornelius* cases, in this case Plaintiffs had access to numerous alternative channels of communication to distribute their opinions regarding political issues. Plaintiffs' inability to print their political position in the city water bill's message box did not hinder their ability to convey their position in many other ways. *See also, Members of City Council of City of Los Angeles v. Tax payers for Vincent*, 466 U.S. 789, 815 (1984).

For these reasons, the Court finds Defendants' decision to restrict access to the water bill's message box to a monthly message from the mayor alone was reasonable.

2. Viewpoint Discrimination

In addition to their denial of access to a designated public forum claim, Plaintiffs also allege Defendants unconstitutionally discriminated against them on the basis of viewpoint. The fact that the Court determined the water bill's message box is a non-public forum rather than a designated public forum does not eliminate Plaintiffs' viewpoint claim,

because even though the government may properly limit access to a non-public forum, it "violates the First Amendment when it denies access to... [a nonpublic forum] to a speaker solely to suppress his views on an otherwise includible subject." *Cornelius*, 473 U.S. at 806.

In this case, Plaintiffs allege Defendants rejected their request to print a message in the water bill's message box because of the city's viewpoint discrimination. Plaintiffs base their argument on the city's reply to their letter, which stated: "[w]e must decline your request. The City of Albuquerque does not allow political position statements to be included in the water bill." Doc. 28, exh. M. According to Plaintiffs, since the city did permit a political position statement in the March 1999 water bill, Defendants' explanation is faulty and evidences the city's viewpoint discrimination.[15] Drawing their argument primarily on the "factually similar" *East Timor* (Doc. 28 at 7), Plaintiffs point out that in *East Timor* the court determined that the Department of Transportation had engaged in impermissible viewpoint discrimination because "[c]ertain politically sensitive signs were permitted, and certain politically sensitive signs were not permitted." 71 F. Supp.2d at 347.

---

[15] The Court notes the city's refusal to print Plaintiffs' message is Plaintiffs' only basis for arguing viewpoint discrimination. Plaintiffs present no evidence Defendants' position on the City Charter Amendments – the subject of Plaintiffs' desired message – actually differed from their own position.

Plaintiffs accurately argue the city cannot deny access to the water bill's message box on the basis of Plaintiffs' viewpoint. Unfortunately for Plaintiffs however, this is not what occurred. Despite the poor explanation of the city's rejection of Plaintiffs' request from the city attorney's office, the insurmountable problem with Plaintiffs' argument is that it ignores the scope of the forum at issue. The city water bill's message box is a forum limited to the *mayor alone*. Thus, regardless of the viewpoint expressed in Plaintiffs' requested message, the message was not within the scope of possible messages for the message box because it was not from the mayor. The city only could have discriminated on the basis of viewpoint if the denied message was otherwise includible in the forum's limitations, and here, because the message came from a private group and not the mayor, the message was not otherwise includible.

Again Plaintiffs' comparison with the "factually similar" *East Timor* fails precisely because of the factual differences with that case. In *East Timor* the court specifically concluded that the plaintiff's proposed signs were not "inconsistent with the intended use of the forum." 71 F.Supp.2d at 347 (citation omitted). Unlike in *East Timor*, in this case Plaintiffs' requested message was inconsistent with the intended use of the forum because the requested message came from someone other than the mayor of Albuquerque. Admittedly, Defendants' failure to frilly articulate the nature of the forum in the explanation of their rejection of Plaintiffs' request

created unnecessary confusion over the scope of possible messages for the water bill's message box. Nonetheless, Defendants' overbroad explanation of the reason for their rejection did not transform the nature of the water bill's message box into a forum that permits access to anyone so long as their requested message does not contain a "political position." At most, Defendants' letter demonstrates a poor explanation of an otherwise legitimate policy which, because of its prohibitive limitations, necessarily barred Plaintiffs' request.

Therefore, the Court finds Defendants' rejection of Plaintiffs' requested message did not constitute unconstitutional viewpoint discrimination.

d. Prior Restraint

In Plaintiffs' last forum-related claim they allege Defendants' denial of access to the water bill's message box was an unconstitutional prior restraint. There are at least two difficulties with the prior restraint argument. First of all, it seems unlikely that the water bill's message box policy should even be considered under a prior restraint model. Although Plaintiffs sought and were denied access to the water bill's message box, there is no way they could have gained access to the message box because of the limitations restricting access to the mayor. The Court sees no reason to examine the denial under a system of prior restraint on speech because there is no discretion or judgment involved in examining requests for access to the water bill's message box. The consideration is simple – if the request comes

from someone other than the mayor it will be denied.

The second difficulty is, unlike the analysis of viewpoint discrimination above, the analysis of prior restraints is directly impacted by the Court's determination of the nature of the forum in the case at hand. While prior restraints on speech are generally analyzed with strict scrutiny, prior restraints on speech in nonpublic forums are examined under a reasonableness test because the "context in which the restriction occurs affect[s] the level of scrutiny applied." *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 749 (7th Cir. 1999). *See Hazelwood School Dist. v. Kuhlmeir*, 484 U.S. 260, 273 (1988) (prior restraint of speech in nonpublic forum is constitutional if reasonable). In this case, even if Defendants' restriction on access to the water bill's message box is considered a prior restraint, this prior restraint is reasonably related to the city's purpose m maintaining the water bill's message box as a nonpublic forum reserved exclusively for the mayor.

The Court, therefore, finds Defendants did not apply an unconstitutional prior restraint on speech when it rejected Plaintiffs' message.

C. Unconstitutional Use of Public Funds

In their final claim, Plaintiffs allege Defendants' actions violated the First Amendment. Specifically, Plaintiffs argue Defendants unconstitutionally engaged in partisan promotion of the quarter-cent tax initiative because: (1) they placed the message from the mayor in the water bill's

message box; (2) the mayor issued a message in a city newsletter which informed readers of his proposal and the reasons he deemed it important; and (3) the mayor organized a neighborhood meeting to discuss the tax initiative.[16] Plaintiffs base their argument on a number of state cases that find "[a]t some threshold level, a public entity must refrain from spending public funds to promote a partisan position during an election campaign." *Carter*, 121 N.M. at 583. Mindful that unconstitutional practices may get their "first footing" in the "mildest and least repulsive form,"[17] the Court nevertheless finds no merit in Plaintiffs'

---

[16] Plaintiffs themselves recognize that although partisan promotion of an issue is impermissible, education on a ballot issue is legitimate. Doc. 29 at 15. Furthermore, the cases which Plaintiffs cite indicate it is acceptable for a government official to express his personal opinion on an issue. *See, e.g., Carter v. The City of Las Cruces*, 915 P.2d 336, 339 (N.M. Ct. App. 1996). Plaintiffs, however, offer no evidence to indicate the message in the newsletter or the neighborhood meeting were anything more than an effort to educate the public about the mayor's initiative and an expression of the mayor's personal viewpoint. As a threshold matter, the Court finds no reason to consider either of these actions. and, therefore, only considers the mayor's message in the city water bill in its analysis of the unconstitutional use of public funds claim. However, even if these other actions were considered they would not affect the Court's conclusion. *Cf Federal Election Comm'n v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va.) *aff'd* 92 F.3d 1178 (4th Cir. 1995) (nonprofit corporation's advertisements informing public on "gay agenda" of presidential candidates not governed by Election Commission as they did not contain explicit words or imagery advocating electoral action).

[17] Boyd v. U.S., 116 U.S. 616, 634 (1886).

allegation and rejects Plaintiffs' argument.

The most formidable hurdle to Plaintiffs' argument is a legal one. In all of the cases on which Plaintiffs rely, as well as other cases in which courts have struck down the government's use of public funds to support an election issue, the courts based their holdings on the violation of some state regulation – no court has grounded its decision on the First Amendment.[18] Here, in significant contrast

---

[18] The state courts' holdings rely exclusively on state law grounds and if they mention federal constitutional implications at all, they do so in dicta. In Carter, for example, the court noted "On this appeal, we need not and do not decide whether Plaintiff states a valid claim for violation of constitutional rights. ... However, because we are remanding this case for further proceedings, we do observe that Plaintiffs claims under the United States Constitution are not without support." 915 P.2d at 338 (emphasis added). In terms of the state law foundation for the holdings: *see, Stanson v. Mott*, 551 P.2d 1 (Cal. 1976) (court declined to allow the Park Dept. to support a park bond issue, because the state statute which authorized the department to disseminate information about the agency's activities did not expressly authorize the department to spend funds on campaigns); *Anderson v. City of Boston*, 380 N.E.2d 628 (Mass. 1978) (the court found the city of Boston had no authority, under state statute regulating election financing, to support an amendment to state constitution and enjoined the city from expending funds), stayed by, *City of Boston v. Anderson*, 439 U.S. 1389, (Brennan, J., as Circuit Justice), *aff'd mem.*, 439 U.S. 951 (motion to vacate stay order denied); *Citizens to Protect Public Funds v. Board of Parsippany-Troy Hills Tp.*, 98 A.2d 673 (N.J. 1953) (court rejected board of education's use of public funds to promote a school bond issue finding "no express statutory provision authorizing the expenditure by boards of education of public funds in the manner done by the defendant board"); Burt

to these cases, Plaintiffs' claim suggests no violations of state law; instead, Plaintiffs' claim is founded exclusively on the First Amendment. Simply, then, the Court finds no authority to conclude the First Amendment bars the mayor from placing a non-neutral message regarding a tax initiative for the

---

v. Blumenauer, 699 P.2d 168 (Or. 1985) (en banc) (court determined Health Dept.'s use of taxpayer funds to promote a health issue was beyond the authorization of the state statutory scheme).

In two other commonly cited federal court government speech cases, which Plaintiffs did not rely on, the courts again based their holdings on state statutes. *See, Campbell v. Joint Dist. 28-J*, 704 F.2d 501 (10th Cir. 1983) (court found no need to reach the constitutional questions, because it found school board's support of an amendment to state constitution was not authorized by Colorado's campaign statutes); *see also, Mountain States Legal Foundation v. Denver School Dist. No. 1*, 459 F. Supp 357 (D. Cob. 1978) (court found no state statutory authorization for school board's expenditure of funds to defeat a proposed state constitutional amendment). In dicta in *Mountain States*, the court mentioned Article IV, Section 4 (republican form of government) concerns with defendant's actions. 459 F. Supp at 360-61. Besides the fact the court's discussion of Article IV Section 4 concern is dicta, and since Plaintiffs do not raise an Article IV Section 4 claim, *Mountain States* is further inapplicable for comparison because the court's primary concern was with the school board expenditure of public funds to *oppose a citizen proposed* state constitutional amendment: "[w]hen residents within a state seek to participate in this process by proposing an amendment to the state constitution, the expenditure of public funds in opposition to that effort violates a basic precept of this nation's democratic process." *Id.* Here, in contrast, any expenditure of public funds by Defendants was to promote a tax initiative which was *proposed by the mayor himself.*

city's welfare, which he had himself proposed, in the space reserved to him in the city water bill's message box.[19] In fact, one of the few federal cases to have examined a government speech claim solely with respect to its First Amendment implications, rejected the plaintiff's claims. *Alabama Libertarian Party v. City of Birmingham. Ala.*, 694 F. Supp. 814 (N.D. Ala. 1988).[20]

---

[19] To the extent Plaintiffs are claiming the mayor used governmental resources to foster his political position, there is some question as to the applicability of the First Amendment. In Common Cause v. Bolger, 574, F.Supp. 672, 681 (D.D.C.) *aff'd without opinion* 461 U.S. 911 (1982), political candidates challenged the incumbent's use of the franking privilege on the ground that it was a government subsidy which permitted incumbents an unfair advantage. The three judge panel considered the applicability of the First Amendment and concluded:

> [i]n fact, beyond acknowledging that the franking statute has some limited impact upon speech-related rights, the First Amendment ensures that one's own speech be free, unfettered, and unabridged, it does not alone require that each individual be entitled to this particular privilege of incumbency that certain others may enjoy. For this reason, questions of the constitutionality of governmental-created imbalances are much better suited to analysis under the principle of equal protection than under freedom of speech.

574 F.Supp at 681. (footnote omitted).

[20] One commentator distinguished the results in *Alabama Libertarian* from the results in the other government speech cases precisely because "[o]ther courts found a statutory basis for their decisions, using constitutional principles only for support," while "[*Alabama Libertarian*'s] holding was founded solely on the federal Constitution." Leigh Contreras, Note, *Contemplating the*

In *Alabama Libertarian*, the court considered a group of taxpayers' allegation that the city of Birmingham's promotion of a series of city initiatives (property taxes, telephone charges, and bond issue) violated their First Amendment rights. The court carefully considered the claim and concluded that the city's use of public funds to support the initiatives was not unconstitutional. The court found:

> [t]his was not a case where municipal funds were used to support a particular candidate, doctrine or ideology. Rather, the City merely solicited its citizens to provide funds to supply perceived needs common to all. The City and its officials not only have the right, but the duty, to determine the needs of its citizens and to provide funds to service those needs. The funds must come from some source.... While defendants might be forbidden to spend funds to support candidates, oppose initiative proposals, etc., they are not forbidden to publicize and seek public support for their own governmental proposals.

694 F. Supp. at 817-18. As in *Alabama Libertarian*, this Court is not called upon to decide the constitutionality of a municipality's expenditure of funds to support a candidate in an election or to oppose a citizen-driven initiative. In this case, where

---

Dilemma of Government As Speaker: Judicially Identified Limits on Government Speech in the Context of Carter v. City of Las Cruces, 27 N.M. L. Rev. 517, 528 (1997).

the mayor provided minimal advocacy of a tax initiative he created, the Court finds no First Amendment violation.

Finally, the Court notes the Supreme Court's language in its recent decision *Board of Regents of the Univ. of Wisconsin System v. Southworth*, --- U.S. ----, 120 S.Ct. 1346 (2000).

Although the Supreme Court did not specifically address the government's right to use its own funds to advance a particular governmental program or government introduced initiative, the Court noted:

> [i]t is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.

Id *6. While admittedly dicta, the Supreme Court's understanding of the issue strengthens this Court's conclusion that Defendants' publication of the water bill's message box with a message advocating a proposition on a tax initiative to advance city programs, which the mayor himself had proposed, did not constitute an unconstitutional use of public funds.

Unlike the cases mentioned above which contained specific factual events that could conceivably raise constitutional concerns not present here, the Court finds no ominous threat to the First Amendment in Defendants' minimal action. For the reasons discussed, the Court concludes Defendants did not violate Plaintiffs' First Amendment rights.

III. CONCLUSION

After considering all the arguments and legal authority, the Court concludes Plaintiffs claims fail. For the reasons stated above, the Court finds Defendants did not create a designated public forum, and, in their rejection of Plaintiffs' proposed message, Defendants did not unconstitutionally discriminate on the basis of viewpoint or apply an unconstitutional prior restraint on speech. Furthermore, the Court finds Defendants actions did not constitute an unconstitutional use of public funds in violation of Plaintiffs' First Amendment rights. For these reasons, summary judgment for Defendants is appropriate. A final order will follow this opinion.

Dated at Albuquerque this 25th day of April, 2000.

/s/ Bruce D. Black
BRUCE D. BLACK
United States District Judge

Attorneys:

For Plaintiff
David A. Standridge, Jr.
2501 San Pedro Dr. NE, Suite 102
Albuquerque, New Mexico 87110

For Defendant
Kathryn Levy
Mark Hirsh
Assistant City Attorneys
P.O. Box 2248
Albuquerque, New Mexico 87103

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELIZABETH H. COOK, FRANK BOWDEN, and JAMES COOPER,
Plaintiffs,

v. No. CIV 99-00322 BB/WWD

JIM BACA, in his capacity as Mayor of the City of Albuquerque and CITY OF ALBUQUERQUE,
Defendants.

JUDGMENT OF DISMISSAL

This Court having issued an opinion on April 25, 2000, granting Defendants' motion for summary judgment (Doc. 34), it is hereby ordered that Plaintiff's case is DISMISSED.

Dated at Albuquerque this 25th day of April, 2000.

/s/ Bruce D. Black
BRUCE D. BLACK
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ELIZABETH H. COOK, FRANK BOWDEN, and JAMES COOPER,
Plaintiffs - Appellants,

v.

JIM BACA, in his capacity as Mayor of the City of Albuquerque and CITY OF ALBUQUERQUE,
Defendants - Appellees.

No. 00-2180

ORDER
Filed May 1, 2001

Before TACHA, Chief Judge, LUCERO, Circuit Judge, and BROWN,* District Judge.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in

---

* Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, sitting by designation.

regular active service on the court requested that the court be polled, that petition is also denied.

It is further ordered that appellants' motion to publish the order and judgment is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: /s/ Audrey F. Weigel
Deputy Clerk